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No. 90-136

In The

Supreme Court of the United States

October Term, 1990

RICHARD FRAIGE and VINYL PRODUCTS MANUFACTURING, INC.,

Petitioners,

vs.

AMERICAN NATIONAL WATERMATTRESS CORPORATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Respondent American National Watermattress Corporation submits the following opposition to the Petition For Writ Of Certiorari filed by petitioners Richard Fraige and Vinyl Products Manufacturing, Inc.

RULE 29.1 STATEMENT

Respondent American National Watermattress Corporation has no parent companies, subsidiaries, or affiliates.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments in the instant petition for writ of certiorari reduce to two fundamental contentions. The first – that a document which does not contain all of the information specified in Rule 3(c), F.R.App.P.,[1] should nevertheless be considered to be "the functional equivalent of a notice of appeal" – was squarely rejected by this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

The second – that a premature notice of appeal should be deemed to be incorporated by reference in

[1] Rule 3(c) provides as follows:

> "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal."

subsequently filed documents for the purpose of determining compliance with Rules 3(c) and 4(a), F.R.App.P. – is directly contrary to Rule 4(a)(4), and this Court's explication of Rule 4(a)(4) in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). ("The [premature] notice of appeal . . . was not merely defective; it was a nullity." (*Ibid.* 459 U.S. at 61.))

The Court of Appeals for the Federal Circuit correctly applied the law, in accordance with the decisions of this Court, in dismissing petitioners' purported appeal. The petition for writ of certiorari should be denied.

ARGUMENT

I

THE FEDERAL CIRCUIT'S RULING THAT DOCUMENTS FILED BY PETITIONERS DURING THE RULE 4(a), F.R.APP.P., APPEAL PERIOD WERE NOT "THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL" WAS COMPELLED BY, AND IN ACCORDANCE WITH, THIS COURT'S DECISION IN TORRES V. OAKLAND SCAVENGER COMPANY.

The first issue petitioners have urged the Court to consider in this petition is whether documents filed by petitioners during the Rule 4(a) appeal period, subsequent to the filing of their premature notice of appeal, constitute "the functional equivalent of a notice of appeal." Petitioners pose this issue as deserving the Court's attention because (petitioners urge) the question what documents do or do not constitute the functional equivalent of a notice of appeal "has created a great deal

of conflict in decisions of various Circuit Court (sic) of Appeals." (Petition, page 8)

In reality, there is no such "conflict." This Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) resolved the question whether a document which does not contain the information specified in Rule 3(c), F.R.App.P., qualifies as "a notice of appeal." Furthermore, *Torres v. Oakland Scavenger Co.* is controlling in the instant case, as the Federal Circuit recognized in citing *Torres* as the controlling authority in its ruling dismissing petitioners' purported appeal. (Petitioners' Appendix, page 3a)

A "notice of appeal" is defined by Rule 3(c) as a document which contains the information Rule 3(c) requires. Rule 3(c) is indifferent about the physical form or title of the document; what matters is the information the document contains. To qualify as a "notice of appeal" under Rule 3(c), a document must contain the following information:

(1) The party or parties taking the appeal

(2) The judgment, order or part thereof appealed from

(3) The name of the court to which the appeal is taken

None of the documents urged by petitioners to be the functional equivalent of a notice of appeal meets these Rule 3(c) criteria, for none identifies, expressly or by implication, "the judgment, order or part thereof appealed from." Contrary to petitioners' contention in the instant petition, therefore, the facts of this case do not present the question whether documents filed incident to

an appeal may function as a Rule 3(c) notice of appeal. The only question presented by the facts of this case is whether a document which omits information required by Rule 3(c) can be the functional equivalent of a notice of appeal notwithstanding the omission.

This Court answered exactly that question in *Torres v. Oakland Scavenger Co.* – the case cited by the Federal Circuit as the controlling authority for its ruling in the instant case. (Petitioners' Appendix, page 3a) The Court held in *Torres* that a notice of appeal which did not include petitioner Jose Torres' name as appellant was not, as to Torres, a Rule 3(c) notice of appeal. (*Torres v. Oakland Scavenger Co., supra,* 487 U.S. at 317.) (The notice met the Rule 3(c) requirements as to other parties to the action who were named in the notice.) It was irrelevant that Torres *intended* to appeal. (*Ibid.* 487 U.S. at 317.) The omission of Torres' name as appellant – one of the three items of information required by Rule 3(c) – *ipso facto* disqualified the document as a Rule 3(c) "notice of appeal." (*Ibid.* 487 U.S. at 317-318.)

> " . . . [W]e find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal." (*Torres v. Oakland Scavenger Co., supra,* U.S. at 317.)

Not only did this Court's decision in *Torres* squarely answer the question the instant petition purports to raise,

but precisely the same arguments petitioners have urged as grounds for reinstatement of their appeal were considered and rejected by the Court in deciding *Torres*. This is apparent from a comparison of petitioners' arguments in the instant petition to Mr. Justice Brennan's dissenting opinion in *Torres*. (*Ibid*. 487 U.S. at 319-325.) Petitioners' arguments are virtually a word-for-word, case-by-case, reiteration of Mr. Justice Brennan's dissenting opinion. (See 487 U.S. at 323-325.) Thus, if this Court were to grant certiorari in the instant case, and decide this case on its merits, the Court would confront precisely the same arguments which the Court confronted and decided in *Torres*. Petitioners offer nothing that even arguably supports the conclusion that the Court would view those arguments any differently in the context of this case than it did in *Torres*. *A fortiori* petitioners offer nothing that supports the conclusion that the Court would, upon revisitation of those arguments, reach a different result.

II

THE FEDERAL CIRCUIT'S RULING THAT PETITIONERS' PREMATURE NOTICE OF APPEAL WAS NOT EFFECTIVE IN COMBINATION WITH SUBSEQUENTLY FILED DOCUMENTS TO CONFER APPELLATE JURISDICTION WAS COMPELLED BY, AND IN ACCORDANCE WITH, RULE 4(a)(4) F.R.APP.P., AND THIS COURT'S DECISION IN GRIGGS V. PROVIDENT CONSUMER DISCOUNT COMPANY.

Petitioners make an alternative argument. If the documents filed by petitioners during the Rule 4(a) appeal period do not qualify as a notice of appeal in themselves, petitioners argue, they qualify if *combined* with the premature notice of appeal. The Federal Circuit's refusal to

consider those documents in combination with the premature notice of appeal was, according to petitioners, inconsistent with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), and with *dictim* in the Court's decision in *Torres v. Oakland Scavenger Co., supra*, 487 U.S. 312. (Petition, page 10)

Petitioners' argument that their premature notice of appeal should be combined with documents filed during the Rule 4(a) appeal period finds no support in the documents themselves. The documents do not purport to incorporate the notice of appeal by reference.[2] (Cf. *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2 881, 889 fn. 74 (D.C.Cir. 1987), where the court posed and discussed a hypothetical incorporation by reference of a premature notice of appeal.) If there is any warrant for considering petitioners' premature notice of appeal in combination with subsequently filed documents for the purpose of determining compliance with Rules 3(c) and 4(a), F.R.App.P., therefore, it must be found elsewhere than in the documents themselves.

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[2] Petitioners state at page 4 of the petition that their September 5, 1989 letter to the district court clerk concerning the appeal filing fee (14a, 15a) "incorporated by reference the notice of appeal previously filed by petitioners." The statement is not accurate. The September 5 letter referred to "the Notice of Appeal," and enclosed a copy of an earlier letter (16a) which referred to "the Notice of Appeal." Neither letter purported to incorporate the notice of appeal, or the information in the notice of appeal, by reference.

The only other possible warrant for combining petitioners' premature notice of appeal with the subsequently filed documents would be a rule of law requiring such combination – notwithstanding the silence of the documents about incorporation by reference. But there is plainly no such rule of law. Furthermore, the creation of such a rule of law would be contrary to Rule 4(a)(4), which expressly states that a premature notice of appeal "shall have no effect." This Court has interpreted Rule 4(a)(4) to mean that a premature notice of appeal is "not merely defective," but "a nullity." (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56, 61 (1982).)[3]

The Federal Circuit was thus undeniably correct in concluding that there is no warrant for combining petitioners' premature notice of appeal with documents filed during the Rule 4(a) appeal period as grounds for assuming appellate jurisdiction of the case.

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[3] *Foman v. Davis,* 371 U.S. 178 (1962), decided 17 years before the enactment of Rule 4(a)(4), did not purport to create or recognize a rule of law that a premature notice of appeal must be considered in combination with subsequently filed documents in determining appellate jurisdiction. Among other reasons, appellate jurisdiction was not in issue in *Foman.* Petitioner Foman had unquestionably perfected an appeal; the issue was what district court ruling was before the appellate court for review. Under the unique circumstances of the case (the parties had briefed and argued the same district court ruling), this Court held that the premature notice of appeal was effective – not to invoke appellate jurisdiction – but to justify appellate review of the judgment designated in the premature notice of appeal.

CONCLUSION

"It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' " (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56 at 61.) Two other rules of law are also well settled.

The first is that a document which does not contain the information required by Rule 3(c), F.R.App.P., is not "the functional equivalent of a notice of appeal." (*Torres v. Oakland Scavenger Co., supra,* 487 U.S. 312, 317.) The second is that a notice of appeal filed prematurely under Rule 4(a)(4) is "a nullity." (*Griggs v. Provident Consumer Discount Co., supra,* 459 U.S. 56 at 61.).

The Court of Appeals for the Federal Circuit correctly applied each of these settled rules of law in the instant case. The petition for writ of certiorari should accordingly be denied.

Respectfully submitted,

JAMES B. ANDRES
Attorney for Respondent
American National Watermattress Corporation